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No. 76-1546

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, AND JAMES VINCENT FEENEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that evidence against them was improperly admitted at trial in the absence of proof that the evidence was legally obtained.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of possession of marijuana with intent to distribute and of conspiracy to commit that offense in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Cruz was sentenced to three years' imprisonment to be followed by two years' special parole. Petitioners McCutcheon, Sandlin and Feeney were each sentenced to five years' imprisonment to be followed by three years' special parole. The court of appeals affirmed *per curiam* (Pet. App. A).

On March 27, 1975, agents of the Drug Enforcement Administration, acting under a search warrant, raided a house near Corpus Christi, Texas, and seized approximately 721 pounds of marijuana. Petitioner Cruz was arrested in the garage, which housed approximately 345 pounds of marijuana stacked in kilo-sized bricks. Petitioner Sandlin was apprehended while climbing a back wall and petitioner Feeney was found hiding behind a table containing a large number of the marijuana bricks (Supp. R. 72-78, 153-155, 163, 209-212). Petitioner McCutcheon was arrested in the living room, where agents also found 38 pounds of marijuana bricks locked in a desk; a search of McCutcheon produced approximately $12,000 in cash (Supp. R. 219-220).

1. Petitioners were indicted on June 11, 1975, together with four other men, including Oscar Guerra. On September 11, 1975, Guerra's motion for severance was granted, and petitioners' trial commenced with the selection and swearing of a jury and the court's rendition of preliminary instructions. The trial was then recessed until September 30, 1975, and, thereafter, until October 22, 1975.

On that date, as the trial was about to resume, petitioners moved to suppress the marijuana heretofore described. The court denied the motion because it was untimely and no good reason was offered for its tardiness (App. 3a-4a).[1] The court also denied petitioners' subsequent oral request to argue a suppression motion filed by Guerra on July 7, 1975, because that request was also untimely and because Guerra had been severed from the case (App. 2a).[2] After the court denied their motions, petitioners did not object to the admission into evidence

[1]"App." denotes the district court order filed November 6, 1975, which we have attached as an appendix to this memorandum.

[2]The case against Guerra was dismissed on the government's motion on December 17, 1975, after he pleaded guilty to state charges arising from the same facts.

of the marijuana, although they did object to testimony concerning the arrival of the government agents at the house and their observations there.

2. There is no merit to petitioners' contention (Pet. 5-7) that the absence of proof that the seizure of the marijuana was legal made its admission into evidence improper. The government is not obliged to show at trial that its evidence was properly obtained. If a defendant desires to challenge the legality of the government's proof, the burden rests upon him to make a pre-trial motion to suppress. Under the pertinent Rules of Criminal Procedure in effect at the time of petitioners' trial (as well as their predecessor provisions and the current Rules), a defendant who neither makes a suppression motion, nor demonstrates good cause for failing to do so, waives his challenge.[3] The district court specifically noted that petitioners did not make the required motion prior to trial, and that they have never suggested any cause for their failure to do so (App. 2a-4a):

> During the discussion concerning the [motions to suppress] made by the several Defendants, and prior to the Court's denial of the requests, the Court was

[3]Under the current provisions, Rules 12(b)(3) and (f), Fed. R. Crim. P., which became effective December 1, 1975, a motion to suppress "must be raised prior to trial," and failure to do so "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

The counterpart provisions in effect at the time of petitioners' trial were Rules 41(f) and 12, Fed. R. Crim. P. While those provisions were not as explicit as the current or predecessor Rules, they have been consistently held to state the same requirements. *E.g., United States* v. *Mauro*, 507 F. 2d 802 (C.A. 2), certiorari denied, 420 U.S. 991; *United States* v. *Farnkoff*, 535 F. 2d 661 (C.A. 1); *United States* v. *Sisca*, 503 F. 2d 1337, 1349 (C.A. 2), certiorari denied, 419 U.S. 1008; cf. *United States* v. *Barber*, 495 F. 2d 327 (C.A. 9). See generally *Segurola* v. *United States*, 275 U.S. 106, 112.

reminded that early in a pre-trial hearing held in July, it had been advised by counsel for the Defendants that there would be no need for any hearings in advance of trial. And, the Court was further advised that the courtroom clerk had contacted the attorneys for the Defendants a few days previously and had been advised there were no matters requiring hearings before the evidence was commenced. * * *

* * * * *

All of the Defendants were aware from the start of the basic nature of the contraband in this case and were aware for a period of over five weeks that the Defendant Guerra * * * had been severed and a separate trial would be held as to him.

* * * * *

> * * * [T]he unexplained, last-minute delay [in raising the suppression motion] would have required the additional time of this Court and the already selected jury. In addition, it would have created serious inconvenience and interruption of normal and previously scheduled judicial processes. No adequate explanation was made for failure to timely file.

Petitioners did not object to the government's acquisition of the marijuana until their trial was underway, although they were aware from the start of the nature of the government's case, and although during the several months since the indictment had been filed they repeatedly assured the court that no hearings would be required.

Under the circumstances, the trial court properly denied the suppression motion as untimely.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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[4]Petitioners claim (Pet. 2) that the decisions below present the issue of their standing to object to the seizure. In fact, since petitioners failed to raise a proper objection to the seizure, the trial court had no occasion to address any possible standing issues and there is no reason for this Court to consider them now.

APPENDIX

ORDER

"The indictment in this case was returned on June 11, 1975. On July 7, 1975, a motion to suppress was filed on behalf of the Defendant Oscar Guerra. On September 8, 1975, the Defendant Rivera filed his motion to suppress. On September 11, 1975, this case was called for jury selection. At that time, all Defendants announced ready, except Defendant Guerra, who waived his constitutional right to a trial by jury and agreed to go to trial before the Court. The Court granted a severance to Guerra. Thereupon, and on the same date, the jury in this cause was selected and sworn and, after the jury was given a short precautionary instruction, the trial of the case was recessed until September 30, 1975, at which time it was anticipated the testimony would commence. However, the recess was, thereafter, extended to October 22, 1975.

"On the appointed date, the Defendants Garza, Cruz, McCutcheon, Sandlin and Feeney, represented by John J. Pichinson, and Defendant Silguero, represented by Albert Huerta, and Defendant Rivera, represented by Albert A. Pena, III, appeared before the Court. At the time the Court convened, there were no motions before the Court except Rivera's motion to suppress which had been filed in early September, 1975. We are not concerned with that motion now.

"After a brief investigation as to the possibility of a conflict of interest arising in a single attorney's representation of five of the Defendants, the Court, upon Mr. Pichinson's representation that he had considered the matter and discussed it with his clients and saw no possible conflict, and the concurrence in this by the Assistant United States Attorney prosecuting this case, was prepared to proceed and bring the previously selected jury into the courtroom.

"There was, however, further delay when counsel for the five Defendants, in open court and before the jury was seated, tendered a short, written motion to suppress evidence in the case. The Court considered it as not timely, since the trial was already in progress, and denied the requested filing for any purpose. Thereafter, all of the Defendants orally requested the Court to hear, at this time, the motion to suppress which had been filed by the Defendant Oscar Guerra in this cause before his case was severed. This request was denied because the motion was not before the Court; the request was an attempt, by subterfuge, to circumvent the Court's prior rulings; these Defendants had no standing to make such a request; and, also, because it was untimely made.

"During the discussion concerning the requests made by the several Defendants, and prior to the Court's denial of the requests, the Court was reminded that early in a pre-trial hearing held in July, it had been advised by counsel for the Defendants that there would be no need for any hearings in advance of trial. And, the Court was further advised that the courtroom clerk had contacted the attorneys for the Defendants a few days previously and had been advised there were no matters requiring hearings before the evidence was commenced. While the Court orally overruled the motions at the time they were presented, as above outlined, the Court has utilized this formal order to explain more fully and clarify for the record the factual background and rationale of the rulings.

"The motion to suppress which had previously been filed by the Defendant Rivera was before the Court, but it was not directed to the same matter as the Guerra motion had been, and it was not directed to the same matter that was involved in the motion first presented to the Court on this date and above discussed. The Rivera

motion was directed at the search of an automobile belonging to said Defendant. No action was taken on the motion, based upon the representations of the Assistant United States Attorney that he did not intend to offer any testimony objected to in said motion, and the acknowledgement by the attorney for Rivera that he understood this to be the case.

"All of the Defendants were aware from the start of the basic nature of the contraband in this case and were aware for a period of over five weeks that the Defendant Guerra had waived his right to a jury trial and would present his case to the Court, and that such Defendant had been severed and a separate trial would be held as to him.

"Rule 41(f) of the Federal Rules of Criminal Procedure provides that motions to suppress may be made 'as provided in Rule 12.' Prior to 1972, Rule 41 (e) specifically required that motions to suppress be filed prior to trial, and on December 1, 1975, less than a month from this day, the new amendment to the Federal Rules will go into effect, and they also have an explicit requirement that such motions be filed prior to trial. See Advisory Committee Note to the Proposed Amendments to the Federal Rules of Criminal Procedure, Rule 12. While the 1972 amendments, which are still in effect, restructured Rule 41 and omitted the specific language concerning a pre-trial deadline for such motions, it has been convincingly demonstrated that no change in that traditional requirement was intended. See *United States* v. *Mauro*, 507 F. 2d 803 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

"This rule effects important policies. In this case, the unexplained, last-minute delay would have required the additional time of this Court and the already selected

jury. In addition, it would have created serious inconvenience and interruption of normal and previously scheduled judicial processes. No adequate explanation was made for failure to timely file.

"The Court, by this order and for the reasons set forth, here specifically denies the several requests of the Defendants which were previously orally and in open court denied. IT IS SO ORDERED.

"SIGNED this 6th day of November, 1975.

"/s/ OWEN D. COX
"United States District Judge"

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